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# Supreme Court of the United States

OCTOBER TERM, 1941

OPAL SAXTON DAVIS, *Petitioner,*

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON, AND BRIEF IN SUPPORT THEREOF

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## SUBJECT INDEX


| | Page |
|---|---|
| Petition for Writ of Certiorari | 1 |
| Summary Statement of the Matter Involved | 1 |
| Jurisdictional Statement | 7 |
| Question Presented | 9 |
| Reasons relied on for allowance of the Writ | 11 |
| Brief in Support of Petition for Writ of Certiorari | 13 |
| I Opinion of Court Below | 13 |
| II Jurisdiction | 13 |
| III Statement of the Case | 14 |
| IV Specification of Error | 14 |
| V Argument | 14 |


## TABLE OF CASES CITED


| | |
|---|---|
| *Alaska Packers Ass'n. v. Industrial Acc. Comm.* 276 U. S. 467 | 9, 11 |
| *Alaska Packers Ass'n. v. Marshall*, 95 F. (2d) 979 | 24 |
| *Carlin Construction Co. v. Heaney*, 299 U. S. 41 | 9 |
| *Comar v. Dept. of Labor and Ind.*, 187 Wash. 99 | 24 |
| *Crowell v. Benson*, 285 U. S. 22 | 22 |
| *Davis v. Dept. of Labor and Ind.*, 112 Wash. Dec. 163, 121 P. (2d) 365 | 13 |
| *Grant Smith-Porter Co. v. Rohde*, 257 U. S. 469 | 18 |
| *Ketchikan Lbr. & Shingle Co. v. Faigh*, 24 F. (2d) 63 | 23 |
| *Lahti v. The Terry & Tench Co., Inc.*, 240 N. Y. 292, 148 N. E. 527 | 17 |
| *Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59 | 11, 16, 17, 18, 20, 22 |
| *Mountain Timber Co. v. Washington*, 243 U. S. 219 | 7 |
| *Parker v. Motor Boat Sales, Inc.*, 314 U. S. ....., 62 S. Ct. 221 | 19, 20, 21, 22 |
| *Rock Island Bridge*, 6 Wall. 213 | 16 |
| *Rosengrant v. Havard*, 273 U. S. 664 | 11 |
| *Southern Pacific Co. v. Jensen*, 244 U. S. 205 | 7 |

Page

*State Ind. Board of N. Y. v. Terry & Tench Co., Inc.*, 273 U. S. 639 ..... 9, 11, 17, 18, 20, 22
*Sultan Ry. & Timber Co. v. Dept. of Labor & Ind.*, 277 U. S. 135 ..... 7, 11, 18, 20, 25
*Sultan Ry. & Timber Co. v. Dept. of Labor & Ind.*, 141 Wash. 172 ..... 7, 18
*Sunny Point Packing Co. v. Faigh*, 63 F. (2d) 92 ..... 24

## TABLE OF STATUTES CITED

United States Statutes
Judicial Code, §237(b) ..... 7, 9, 13
28 U.S.C.A. §344(b) ..... 7, 9, 13
Longshoremen's and Harbor Workers' Act
44 Stat. 1424 ..... 11, 20, 23
33 U.S.C.A. §903(a) ..... 11, 20, 23

Washington Workmen's Compensation Act
Laws 1911, Ch. 74 ..... 7
Remington's Revised Statutes of Washington §§7673-7796 ..... 7
Remington's Revised Statutes of Washington §7674 ..... 7, 21

# Supreme Court of the United States

OCTOBER TERM, 1941

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| OPAL SAXTON DAVIS,<br>*Petitioner (Appellant below)*,<br>vs.<br>DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,<br>*Respondent (Respondent below)*. | No..... |

## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Opal Saxton Davis, prays that a writ of certiorari issue to review the judgment entered February 16, 1942, in the Supreme Court of the State of Washington (R. 16) in the above entitled cause.

## SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner filed with respondent her claim for pension for herself and minor child under the Washington workmen's compensation act for the accidental death by drowning of her husband on July 8, 1940, while he was engaged in an extra-hazardous occupation (R. 1-2).

Her claim was rejected by the supervisor of industrial insurance upon the ground that the work which

the deceased was doing at the time of the fatal accident did not come under the jurisdiction of the workmen's compensation act, but was maritime in character; that the accident occurred on board a vessel in navigable waters and was therefore under admiralty jurisdiction (R. 3-4).

Upon successive appeals, such action was sustained by the Joint Board (R. 4), by the Superior Court for King County (R. 6-12), and by the Supreme Court of the State of Washington, being the highest court of said state, the latter court's opinion (R. 13-16) being filed January 30, 1942. A petition for rehearing was filed, which was denied by order entered February 16, 1942 (R. 16) and judgment was likewise entered on February 16, 1942 (R. 16).

Complete findings of fact were entered by the Superior Court for King County and have been set forth in full in the Record at pages 6 to 10, inclusive, and may be summarized as follows:

Ancil Evan Davis accidentally drowned in the navigable waters of the Snohomish River, at Everett, Washington, on July 8, 1940, during the course of his employment, being employed as a structural iron worker by Manson Construction & Engineering Co., which was a contributor to the state workmen's compensation fund (Finding I, R. 6).

The Manson company had a contract with the state highway department to build a portion of a new bridge spanning the Snohomish River, at Everett, and, upon its completion, also to dismantle the old drawbridge and remove its draw-rest and piers, the bridges being about 800 feet apart (Finding II, R. 6).

Under its contract, the Manson company was required to stock-pile the steel removed from the old drawbridge, at a place designated as the steel storage site, leased for that purpose by the highway department, located on the north bank of the river about 250 feet north of the draw-rest, or center pier of the drawbridge (Finding IV, R. 7).

[Plaintiff's Exhibit 5 (R. 18A) is an airplane photo taken looking upstream, of that portion of the river which shows the relative locations of the two bridges, the old drawbridge being the one in the center. The steel storage site is the rectangular place marked with an "X" on the north shore of the river.]

On July 2, 1940, the Manson company leased a barge at Everett and with its own tug towed said barge up the river to the drawbridge. Said barge was fastened alongside of a derrick barge belonging to the Manson company, upon which was situated a derrick which was to be used in lowering the steel from the drawbridge onto the rented barge and later to remove the steel from the barge to the steel storage site on shore. The derrick barge was made fast to the north side of the draw-rest, or center pier of the drawbridge, at the downstream or easterly portion of said pier. The tug, derrick barge and rented barge were all licensed vessels (Finding VI, R. 7-8).

The method of loading and unloading the steel removed from the old drawbridge was as follows: The Manson company employed structural iron workers stationed on the span of the old drawbridge to cut the steel beams with oxy-acetylene torches into appropriate lengths for handling. Cables from the derrick on

the derrick barge were attached to each beam before it was cut off, and when completely severed, the boom of the derrick was swung around over the rented barge and the steel beam lowered onto said barge as a temporary storage space until the barge was taken to the shore and the steel unloaded therefrom and stock-piled on the storage site. When the rented barge was loaded with the severed steel beams, said barge and the derrick barge were moved over to the north river bank alongside of the storage site, which required their movement over the navigable waters of Snohomish River, a distance of approximately 200 feet. Said movement was accomplished either by being towed by the Manson company's tug to the north shore of the river, or, if the current was too strong, by putting cables ashore and hauling in on said cables, or by both methods jointly. The steel was then hoisted from the rented barge by means of the derrick boom, which swung around and deposited the steel on the storage site. At the time of decedent's death, the barge on which the steel was being loaded had not been completely loaded and none of the steel had at that time been unloaded and stock-piled on the steel storage site (Finding VII, R. 8).

Decedent was hired by the Manson company on July 2, 1940, as a structural iron worker in connection with its operations in dismantling the drawbridge, and continued in such employ until his death by drowning on July 8, 1940. On the date of his death, his duties were to work on the barge on which the steel was being lowered, to watch the shape of the steel being lowered to the barge, to decide where it

should be placed, and to burn off with oxy-acetylene torches any short stubs of iron hanging to it that would interfere with its being properly piled (Finding VIII, R. 9).

About 9:30 A. M., on July 8, 1940, decedent was last seen standing on the bullrail on the north side of the barge on which the steel was being loaded, about 30 feet from the upstream, or westerly end of the barge. He had discussed with his foreman, Thibeau, the best location to place on the barge a five-ton beam that was about to be severed by the workmen on the draw-span. The foreman at that time was standing on the derrick barge, just west of the steam engine of the derrick. They agreed where the beam was to be placed on the rented barge and the foreman then turned to watch the final cut on the beam. When the beam was cut and the derrick boom started to turn it toward the barge, the foreman noticed that decedent was missing, although only two or three minutes had elapsed since he had last talked with decedent. Decedent's body was recovered from the river about 1:30 P. M. of the same day, about a quarter of a mile downstream (Finding IX, R. 9).

[Plaintiff's Exhibit 6 (R. 18B) taken shortly after decedent's disappearance, shows the relative location of the draw-rest, the derrick barge, and the rented barge onto which the steel was unloaded. The portion of the draw-rest shown in the background in said exhibit is the same as the north side of the easterly end of the draw-rest shown in plaintiff's Exhibit 5 (R. 18A). The letter "D" enclosed in a circle indicates the place on the bullrail of the barge where decedent

was last seen standing, and the letter "T" enclosed in a circle indicates where the foreman, Thibeau, was standing when he last talked with decedent (Finding IX, R. 9). The steel shown on the barge in said exhibit was the first load of steel from the drawbridge, as none had been unloaded on shore up to that time (Finding VIII, R. 8.)].

After reciting the filing and rejection of plaintiff's claim (Finding XI, R. 10) the Superior Court for King County concluded as a matter of law that decedent "at the time of his death was engaged in the performance of a maritime service on a licensed vessel while lying in the navigable waters of the United States; that the employment and duties and locality of the deceased at the time of his death were not matters of purely local concern to which the workmen's compensation act of the State of Washington is applicable, but were directly related to commerce and navigation; and that the plaintiff's rights to recover for the death of her husband are governed exclusively by the law and rules of admiralty jurisdiction" (Conclusion of Law I, R. 10-11).

As a result thereof, judgment of dismissal was entered (R. 11), which was affirmed by the Supreme Court of the State of Washington (R. 13-16).

## JURISDICTIONAL STATEMENT

### (a) Statutory Provision Sustaining Jurisdiction

The statute believed to sustain appellate jurisdiction is Judicial Code §237(b) as amended, 28 U.S.C.A. §344(b).

### (b) State Statute, the Validity of Which Is Involved

The state statute under which petitioner claims a pension is the Washington workmen's compensation act, Chapter 74, Washington Session Laws of 1911, p. 345, as amended, Remington's Revised Statutes of Washington, 1932, §§7673-7796. Since the applicability of said act was held by the highest state court to be excluded by the general maritime law, we merely point out that the Washington workmen's compensation act applies to all extrahazardous employments "which are within the legislative jurisdiction of the state" (Rem. Rev. Stat. of Wash., 1932, §7674; *Sultan R. & T. Co. v. Department*, 141 Wash. 172, 176, affirmed 277 U. S. 135) and thus includes the entire field not excluded from state jurisdiction by the "general maritime law * * * in its international and interstate relations." *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216. We briefly summarize the provisions of said act by the following quotation from this court's opinion in *Mountain Timber Co. v. Washington*, 243 U. S. 219, at page 228:

> "The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction

over such controversies. It is obligatory upon both employers and employees in the hazardous employments, and the state fund is maintained by compulsory contributions from employers in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death."

**(c) Date of Judgment Sought to Be Reviewed**

The date of the judgment of the Supreme Court of the State of Washington sought to be reviewed is February 16, 1942 (R. 16).

**(d) Nature of the Case and the Rulings Below**

Petitioner's claim for pension was made in the belief that although her husband lost his life while engaged in work on navigable waters, nevertheless the enterprise in which decedent was engaged at the time he was drowned was in the performance of his employer's contract to dismantle the drawbridge, purely a local matter, regulation of which by the state would work no material prejudice to the characteristic features of the general maritime law or interfere with its uniformity, and having only an incidental relation to navigation and commerce, and therefore the state workmen's compensation act could apply.

This federal question was specifically raised in all the proceedings below, and the Supreme Court of the State of Washington directly ruled on the federal question, which was the only question involved (R. 13-16).

The Department of Labor and Industries had denied the claim upon the ground that the state act was not applicable as the decedent's employment was di-

rectly related to commerce and navigation, and petitioner's rights, if any, were governed exclusively by the laws and rules of admiralty jurisdiction (R. 3-5). Such denial was sustained by both courts below (R. 10-16).

The sustaining of such federal claim against the application of the state workmen's compensation act brings the case directly within the Judicial Code §237(b), as amended, 28 U.S.C.A. §344(b) relied upon.

### (e) Cases Sustaining Jurisdiction

The cases believed to sustain the jurisdiction of this court are:

*State Industrial Board of N. Y. v. Terry & Tench Co., Inc.*, 273 U. S. 639 (Certiorari granted 269 U. S. 548);

*Alaska Packers Association v. Industrial Accident Commission*, 276 U. S. 467 (Certiorari granted 275 U. S. 512);

*Carlin Construction Co. v. Heaney*, 299 U. S. 41 (Certiorari granted 298 U. S. 637).

## QUESTION PRESENTED

Where a structural steel worker was employed in an "extrahazardous" industry by a construction company having a contract with the State Highway Department to dismantle an old drawbridge over the Snohomish River, at Everett, Washington, the steel beams of the drawbridge being cut by acetylene torches by workers on the span, then lowered by means of a floating derrick made fast to the draw-

rest or center pier of the drawbridge, and loaded onto a floating barge tied alongside as a temporary storage space until the steel could be unloaded, as required by the contract, at a storage site on the shore of the river leased by the State, which unloading required the barge to be moved a distance of only 200 feet to shore over the navigable waters of the river, and said worker's duties required him to stand on the barge on which the steel was loaded to watch the shape of the steel being lowered, to decide where it should be placed, and to burn off any short stubs of iron hanging to it that would interfere with its being properly piled, and who, while so employed, fell overboard from the barge into the river and was drowned, was the work in which said worker was engaged at the time of his death:

(a) essentially local in character, having only an incidental relation to navigation and commerce, so that the provisions of the Washington Workmen's Compensation Act providing for a pension to petitioner, as decedent's widow, can be applied without working material prejudice to the characteristic features of the general maritime law or interfere with its uniformity?

or, conversely,

(b) directly related to commerce and navigation, so that petitioner's rights to recover for death of her husband are governed exclusively by the law and rules of admiralty jurisdiction?

## REASON RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the Supreme Court of the State of Washington (R. 13-16), in holding that the general admiralty law rendered inapplicable the Washington workmen's compensation act to the accident herein involved, has decided a federal question of substance in a way not in accord with the following applicable decisions of this court:

*Millers' Indemnity Underwriters v. Braud*, 270 U. S. 59;

*State Industrial Board of N. Y. v. Terry & Tench Co., Inc.*, 273 U. S. 639;

*Rosengrant v. Havard*, 273 U. S. 664;

*Alaska Packers Association v. Industrial Accident Commission*, 276 U. S. 467;

*Sultan Railway & Timber Co. v. Department of Labor & Industries*, 277 U. S. 135.

In those cases it was held that the general admiralty law did not render inapplicable the respective state workmen's compensation acts of Texas, New York, Alabama, California and Washington, although the employment involved in each of said cases was maritime in character.

2. The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, in section 3(a) thereof, 33 U.S.C.A. §903(a), expressly limits its application: Making compensation payable "only if * * * recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The allowance of the writ herein sought will be of assistance to the numerous Deputy

Commissioners of the United States Employees' Compensation Commission for the various compensation districts throughout the United States who are charged with administering said act, as well as to the various state departments or commissions administering their respective state workmen's compensation acts. A review of this case would furnish a clear guide in many cases, especially with the sharp increase in maritime construction and activity arising out of the present war.

For these reasons it is respectfully submitted that this petition should be granted.

Signed: OPAL SAXTON DAVIS,
By MAURICE R. McMICKEN,
OTTO B. RUPP,
ALFRED J. SCHWEPPE,
*Counsel for Petitioner.*